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AUTHORITIES CITED.

STATUTES AND CONSTITUTIONAL PROVISIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

FELIX GOULED
v.
THE UNITED STATES OF AMERICA. } No. 250.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

This case is here on a certificate from the Circuit Court of Appeals for the Second Circuit.

The plaintiff in error was tried and convicted upon a charge of a conspiracy with one Vaughan and one Podell to defraud the United States in violation of section 37 of the United States Criminal Code and with having used the United States Post Office establishment in violation of section 215 of the Criminal Code. Vaughan pleaded guilty, the jury acquitted Podell, and convicted plaintiff in error.

In the Circuit Court of Appeals there was a contention made that the verdict and judgment were vitiated by reason of the fact that certain papers previously obtained from the office of plaintiff in error were admitted in evidence over his objection. The Circuit Court of Appeals has certified certain questions relating to this contention.

THE CERTIFICATE.

Two of the questions certified relate to a paper which was obtained without a search warrant. The remaining four questions relate to papers obtained while serving search warrants.

The facts relating to questions 1 and 2 are certified as follows:

> In January, 1918, certain officers of the Army of the United States attached to the "Intelligence Department" suspected at least Gouled and Vaughan (the latter being an officer of said Army) in respect of the honesty and integrity of their relations to each other concerning contracts for clothing or equipment with the United States.
>
> At the same time one Cohen, who was a business acquaintance of Gouled's, was a private in said army and also attached to said "Intelligence Department."
>
> By the direction of the aforesaid officers, Cohen went to Gouled's office during the latter's absence and, under pretense of a friendly call, gained access to papers in said office and secretly possessed himself of several documents which he delivered to his said superior officers. One of these papers was by them subsequently turned over to the United States Attorney for the said judicial district.
>
> Gouled did not know what Cohen had done until the latter appeared as a witness against him and on the witness stand detailed the circumstances. (Rec. p. 1.)

The paper so obtained by Cohen and turned over to the United States district attorney was offered in evidence. Objection was made on the ground that such action violated rights secured to Gouled by the Fourth and Fifth Amendments to the Constitution. The objection was overruled and exception duly taken.

Upon this statement of facts the court has certified the following questions:

> 1st. Is the secret taking or abstraction without force by a representative of any branch or subdivision of the Government of the United States of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person a violation of the 4th amendment?
>
> 2d. Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the 5th amendment?

The facts relating to the remaining four questions have been certified as follows:

> On 17th June, 1918, an agent of the Department of Justice made affidavit before a United States Commissioner that there was in Gouled's office in New York City:
>
> "Certain property, to wit, certain contracts of the said Felix Gouled with S. Lavinsky." Which contracts, continued the affidavit, "were used as the means of committing a felony, to wit, a violation of Section 39, U. S. C. C., in that the said Felix Gouled did

use the said contracts as means for the bribery of a certain officer of the United States."

On this affidavit a search warrant, which was lost before trial and is not before this court, was issued by said Commissioner under authority of Title XI of the Act of June 15, 1917 (40 Stat. 228).

By virtue of said warrant an unexecuted written agreement between Lavinsky and Gouled was seized and delivered to said United States Attorney.

Gouled has never been indicted for any offense covered by section 39 U. S. C. C.

On 22d July, 1918, another agent of the Department of Justice made affidavit before the said Commissioner that Gouled had at his said office,

"Certain letters, papers, documents and writings which * * * relate to, concern and have been used in the commission of a felony, to wit, a conspiracy to defraud the United States."

Upon said affidavit and by virtue of said Act of June 15, 1917, said Commissioner issued a search warrant directing the seizing and securing of "the letters, papers, documents and writings" described in the last mentioned affidavit.

Under this warrant there were seized an unknown number of papers, but especially two, together with the envelope containing one of them, viz:

(1) A written and signed contract between Gouled and one Steinthal; and

(2) A bill for disbursements and professional services rendered to Gouled by the defendant Podell—who is an attorney at law.

These documents were likewise delivered to said United States Attorney.

All the paper writings so as aforesaid taken by virtue of said search warrants or either of them belonged to Gouled and were seized in his office, but none of them bore his signature except the Steinthal contract, and none had any pecuniary value except as so much paper stock; but all constituted evidence more or less injurious to Gouled when charged under the indictment subsequently found on July 30th.

After the indictment was found, but before the trial, a motion was made by Gouled to compel the United States district attorney to return to him all papers seized and taken from his office on the 17th of June and 22d of July, 1918, respectively, together with all memoranda, extracts taken therefrom, and copies, photographic or otherwise, made from them. This motion was heard and overruled by the District Judge presiding at that time and his action in this respect is not assigned for error in the Circuit Court of Appeals.

Later, the indictment came on for trial with another Judge presiding. At the trial, and before any evidence was introduced, the motion was renewed on the same papers. The trial judge followed the ruling of his colleague and denied the motion, to

which exception was taken. Whether this action was assigned for error in the Circuit Court of Appeals does not appear from the certificate.

The unsigned Lavinsky contract, seized under the search warrant of June 17, and the Podell bill, seized under the search warrant of July 22, were offered in evidence. They were objected to because they had been obtained and were being used in violation of rights secured by the Fourth and Fifth Amendments. The objection was overruled and exception taken. The Steinthal contract, seized under the search warrant of July 22, was not offered in evidence, but the duplicate original which had been obtained from Steinthal was offered. It was objected to because the seized original having been in the possession of the prosecutor, such possession must have suggested the existence of a counterpart, and therefore the use of Steinthal's original as evidence against Gouled was also in violation of the rights secured to him by the Fourth and Fifth Amendments. The objection was overruled and exception taken. Upon this statement of facts the following questions are certified:

> 3d. Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected, seized and taken in violation of the 4th amendment?

4th. If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant, is such admission in evidence a violation of the 5th amendment?

5th. If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?

6th. If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted, if he then move before trial for the return of said papers and said motion is denied, is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted? (Rec. pp. 3–4.)

STATEMENT AS TO THE RECORD.

It is believed that the facts as certified by the Circuit Court of Appeals fully justify the answers which the Government will insist should be made to the questions certified. Unfortunately, however, the facts relating to the first and second questions are not quite accurately stated in the certificate. While this argument, of course, must be based on the facts as certified, there is one aspect of the case

in which the inaccuracy of the statement may be material and might cause the answer which this court makes to these questions to be misleading.

The Solicitor General, therefore, deems it his duty to call the attention of the court to the inaccuracy, as shown by the record in the Circuit Court of Appeals, so that this court may determine whether it is proper to answer the questions submitted or whether the court should require the whole case to be certified to it for decision.

The certificate states that Cohen went to Gouled's office *during the latter's absence* and, under pretence of a friendly call, gained access to papers in the office. The record in the Circuit Court of Appeals shows that the only testimony on this point was that of Cohen himself. His entire testimony on this question is printed as an appendix to this brief. This shows that he did not go to Gouled's office during the latter's absence. On the contrary, Gouled was present when he went in and they conversed for some time. During the conversation, however, Gouled left the room, and, while he was out, Cohen, seeing the paper on top of a flat-top desk, picked it up and put it in his pocket. If the court should be of opinion that the facts, as thus stated, would require that the answers to the questions submitted should be different from what they would be on the facts as certified, it is respectfully submitted that the court should exercise its jurisdiction to require the entire case to be certified here for decision.

PLAINTIFF IN ERROR'S CONTENTION.

In this case there is no claim that the accused himself was required to testify or to himself produce at the trial his private papers. The claim is simply that his constitutional rights were violated at the trial through the production by others of his private papers, which, he claims, had been obtained from him by means of an unreasonable search and seizure in violation of the Fourth Amendment, and that this production of his papers, in effect, compelled him to testify against himself in violation of the Fifth Amendment.

THE GOVERNMENT'S CONTENTIONS.

The Government contends, on the other hand, that (1) the papers in question having passed from the possession of plaintiff in error, without any violation of his rights under the Fourth Amendment, it can not be said that their production in evidence amounted to compelling him to testify against himself; (2) even if evidence is obtained by means of an unreasonable search and seizure, its admission in evidence, if otherwise competent, is not error unless the court has previously committed error in refusing to order it returned upon application seasonably made; and (3) in this case, since the plaintiff in error has not sought a review of the action of the court on the only application made before the trial, he must be regarded as acquiescing in that ruling and can not now complain because the evidence was subsequently used against him.

BRIEF.

The rights and remedies, under the Fourth and Fifth Amendments, of a defendant in a criminal case have so often been before this court that they would seem to be well settled. But apparently there is considerable confusion in the minds of the profession and the judges of the lower courts as to the scope and effect of some recent decisions. Some judges have felt impelled to hold that the Government can not be permitted to use evidence after it has been obtained from the accused in almost any manner except with his own consent. One judge has held that books and papers in the possession of Federal prosecuting officers, or information acquired from them, can not be used before a grand jury if it appears that, before coming into possession of the officials, they had been stolen from the accused by some person in no way connected with the Government and not acting under its authority or that of any of its officials. This prevalent misconception of what has been decided has a crippling effect upon the efficient administration of the criminal laws, and leads me to submit a much more detailed discussion of the questions involved than I would otherwise deem necessary.

This brief naturally is divided into two parts, namely:

(1) A discussion of the questions relating to the paper taken from plaintiff in error's office by Cohen in January, 1918; and

(2) A discussion of the questions relating to the papers taken from plaintiff in error's office by officers serving search warrants in June and July, 1918.

Part One.

I.

"Is the secret taking or abstraction without force by a representative of any branch or subdivision of the Government of the United States of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such a person a violation of the fourth amendment?"

The Fourth Amendment is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The question is whether the rights secured to Gouled by this amendment were violated when secretly, but without the use of force or judicial or legislative authority, a paper was obtained from his office in the following manner:

The Army maintained an "Intelligence Department," under the direction of Army officers, for the purpose of investigating wrongs and irregularities affecting the Military Establishment and for obtaining information with respect to matters of importance to the War Department. Some of these Army officers suspected that there was something wrong in the relations between Gouled and an Army officer named Vaughan with respect to Army con-

tracts for clothing and equipment. It happened that among the enlisted men attached to the Intelligence Department was one Cohen, who was a business acquaintance of Gouled. These officers, therefore, in effect, directed Cohen to make a visit to Gouled and see what he could learn. Cohen accordingly went to Gouled's office (according to the certificate) in the latter's absence and "under pretense of a friendly call" gained access to the papers in the office, some of which he secretly put in his pocket and delivered to his superior officers.

It will be observed that—

(1) The certificate expressly negatives the use of force.

(2) Cohen did not act, or pretend to act, under any legislative authority or any judicial process.

(3) He was not connected in the remotest degree with the judicial department of the Government or subject to its directions.

(4) He was not an officer of any kind of the United States nor did he claim to be.

(5) He neither acted nor claimed to act under the direction or even with the knowledge of any officer charged by law with any duty in the administration of the criminal laws of the United States.

(6) He did not enter the office or obtain the papers under claim of right or authority or under color of any office.

(7) He entered under the ordinary privilege of a friend and used the same privileges to obtain access to the papers.

(8) The most that can be said is that, entering the office as a friend and resorting to the use of no force, he was accorded access to papers which he stole and carried away.

Either actual force or legal compulsion is necessary to constitute an unreasonable search and seizure.

The question above quoted has arisen during the consideration by the Circuit Court of Appeals of a judgment of conviction in a criminal case. The ultimate question, of course, is whether the judgment shall be reversed on account of the admission in evidence of a paper obtained as above stated. Since the accused was not required to himself produce the paper on the trial, or to testify with respect to it, if there is to be a reversal, it must be on account of the manner in which the paper was obtained. The primary inquiry, therefore, is whether the facts above stated constitute an unreasonable search and seizure within the meaning of the Fourth Amendment.

Since the paper in question was not obtained by the use of judicial process, it is not necessary, for the purpose of answering this particular question, to consider under what circumstances a search warrant may lawfully be issued and served. The present inquiry is whether there was such a search and seizure as is condemned by the Constitution.

The condemnation of the Fourth Amendment does not extend to every search and seizure, but only to those which are unreasonable. A search made by invitation or with consent freely given could not, of course, be called an unreasonable search. That which

a man asks to be done, or freely permits to be done, can not be said to be done in violation of his rights, for it is, in effect, his own act.

It is safe to say that, for a long time, it was generally supposed that there could be no such thing as unreasonable search and seizure without at least a show of physical force; that is, physical force must either be used or threatened in order to make the search. If, under claim of authority, the right to search was demanded under circumstances indicating that the search would be made by force, if necessary, the fact that actual resistance by force was not offered would not prevent the search being unreasonable. But it was generally supposed that, before a violation of the Fourth Amendment could be claimed, it must be shown that there was at least a show or threat of force. This, however, was modified to some extent by the case of *Boyd* v. *United States* (116 U. S. 616). In that case there was no actual search and seizure and no physical force was used. The defendant himself produced the papers on the trial, over his objection. He did this under an order of the court authorized by an act of Congress. The Act did not purport to give the court any power to actually enforce the order. It left the defendant free to obey or disobey as he might see fit. But this option was subject to the condition provided in the Act that, if he declined to obey the order, the affidavit of the United States district attorney, upon which the order had been made, should be taken to

be a true statement of the contents of the paper and should be admitted as evidence thereof. These were the provisions of the Act of Congress of June 22, 1874 (18 Stat., c. 391, sec. 5, p. 187). That Act was not applicable to cases other than criminal cases. The *Boyd case* was a case in which forfeiture of property for a violation of the revenue or customs laws was involved. The court held, however, that an action for the forfeiture of property as a result of a violation of the revenue or customs laws was a case to which the Act applied and with respect to which the defendant was entitled to the rights secured by both the Fourth and Fifth Amendments. The court was unanimous in the opinion that the effect of this proceeding under legislative authority was to compel the defendant to give evidence against himself in a criminal case, and hence violated the Fifth Amendment. A majority of the court was of opinion that it also amounted to an unreasonable search and seizure, and, therefore, violated the Fourth Amendment. Disposing of the contention that the Act of the defendant in producing the papers was voluntary, and that they were not taken from him by any search and seizure, it was said:

> That is so; but it declares that if he does not produce them the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production. (Id. pp. 621–622.)

And, taking the view that compulsion of this kind was equivalent to the physical force which would be necessary to serve a search warrant, the court said:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure. (Id., p. 622.)

The holding is that force is a material ingredient in any unreasonable search and seizure, though this need not always be actual physical force, but that such force is present when a legislative Act requires the accused to either surrender his papers or submit to severe pains and penalties. The rule requiring force as an ingredient has not been further modified by any later decisions of this court. On the contrary, when the rule of the *Boyd case* has been applied, the court has been careful to show that that rule rests upon the proposition that compulsion by legislative or judicial authority is the equivalent of physical force by which, as a result of a search, a man is dispossessed of his property. Thus, in the case of *Hale* v. *Henkel* (201 U. S. 43), a subpœna *duces tecum* was held to amount to an unreasonable search and seizure because it was too general and sweeping in the description of the books and papers which it required to be produced. In that case the subpœna required an

officer of a corporation to produce books and papers belonging to the corporation. The court held that neither the corporation nor its officer could refuse to produce any book or paper belonging to the corporation upon the ground that it would tend to incriminate either the corporation or the officer. The ground upon which the particular subpœna under consideration was condemned was thus stated by Mr. Justice Brown:

> We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. (Id. p. 76.)

In other words, legal compulsion is the equivalent of the physical force which is a necessary ingredient of an unreasonable search and seizure. It would seem, therefore, to be settled that there can be no such thing as an unreasonable search and seizure without the use of physical force or its equivalent—legal compulsion.

In the present case the certificate expressly negatives the use of force of any kind. Cohen entered the office, not under any claim of right, but as a friend. He gained access to the papers in the same way. He had and claimed to have no legal process. No legislative Act gave him authority, and he claimed no authority under any such Act. Physical force was not used and there is no pretense of any legal compulsion to which Gouled was subjected. This alone precludes any conclusion that there was a violation of the Fourth Amendment.

The Fourth Amendment is a limitation upon the powers of the Federal Government. It is not violated by a search and seizure, however wrongful, which is not made under governmental authority, real or assumed, or under color of such authority.

It must be remembered that the Fourth Amendment, like the other amendments adopted at the same time, was adopted for the purpose of making clear certain limitations upon the powers previously granted by the Constitution to the Federal Government. It does not purport to control the conduct of private citizens or individuals. It is a simple limitation upon the powers of the Federal Government. The well-known historical facts which led to its adoption show this to have been the purpose—the language used will admit of no other construction. It was never supposed, I believe, that these amendments afforded security against anything except governmental action. It was, however, early in our history claimed that the restrictions upon governmental action which they imposed applied as well

to the State governments as to the Federal Government, but in *Barron* v. *The Mayor and City Council of Baltimore* (7 Pet. 243), Chief Justice Marshall disposed of this contention saying, at page 249:

> But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

That the sole purpose of this and other amendments adopted at the same time was to protect the citizen against governmental encroachments upon

his rights has always been recognized by this court. In the *Boyd Case, supra*, what was complained of was action taken under the express authority of an Act of Congress. There was, therefore, no question but that this was governmental action. And in *Adams* v. *New York* (192 U. S. 585) it was said (p. 598):

> The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted.

If taken literally, this language would lead to the conclusion that there could be no violation of the Fourth Amendment unless the search and seizure is made under judicial process or unless compulsion is applied by virtue of an Act of Congress. It might be supposed, therefore, that a search and seizure by an officer without any judicial process would not be within the protection of the amendment. That this was not intended, however, was made plain in *Weeks* v. *United States* (232 U. S. 383), where it was said:

> In *Adams* v. *New York* (192 U. S. 585) this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended

> to the action of the Government and officers of the law acting under it. (*Boyd Case, supra.*) To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action. (Id. p. 394.)

The precise case to which the protection of the Amendment was thus extended was stated as follows:

> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant. (Id. p. 398.)

That it was not intended to apply the rule to the acts of an officer of the Federal Government merely because he happened to be such an officer, but only to such acts of his as are done under color of his office or under a claim of authority, was made clear throughout the opinion. Thus it was said, at page 393:

> The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. * * * The United States marshal could only have invaded the house of the accused when armed

> with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action.

And at page 397 it was said:

> If such a seizure under the authority of a warrant supposed to be legal constitutes a violation of the constitutional protection, *a fortiori* does the attempt of an officer of the United States, the United States marshal, acting under color of his office without even the sanction of a warrant, constitute an invasion of the rights within the protection afforded by the Fourth Amendment.

It will be seen that, throughout the opinion, the court is careful, when speaking of acts of officers of the United States, to limit what it says to such acts *when done under color of office or authority.*

In *Silverthorne* v. *United States* (251 U. S. 385), the court is again careful to recognize that, in order to be within the protection of the Fourth Amendment, the acts of an officer of the Government must be done under color of office or authority. Thus it was said at page 391:

> Color had been given by the district attorney to the approach of those concerned in the act

> by an invalid subpœna for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance.

In other words, the seizure was made by a United States marshal acting under color of his office and under color of a subpœna, although an invalid one. It was said in the *Silverthorne case* that the principle applicable was satisfactorily stated in *Flagg* v. *United States* (233 Fed. Rep. 481, 483). In the latter case it appeared that Flagg had been arrested at his place of business and all his books and papers seized without a warrant and taken to the office of the United States attorney, where a warrant was sworn out. There was some uncertainty as to the authority under which the officers making the arrest and seizure were acting, but after considering the evidence the court reached the conclusion that the United States, acting through its accredited agents, was responsible for the arrest of the defendant and the seizure of his property. And the decision that the seizure was unconstitutional was based on *Weeks* v. *United States, supra*, from the opinion in which the following was quoted:

> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the

> defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. (Id., p. 398.)

In the *Weeks case, supra,* it is made clear that the protection of the Fourteenth Amendment is only against governmental action on the part of the Federal Government. In that case the original seizures had been made by local police officers, who turned the papers over to the Federal authorities. Later, another seizure was made by the United States marshal. On an application, seasonably made, to require the return of these papers the court held that the act of the marshal was a violation of the Fourth Amendment and that the papers seized by him should be returned. With respect to the papers then in possession of the same Federal authorities, but which had been seized by the local police officers, the court said (p. 398):

> As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may

> have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies.

There would seem to be no room for doubt that the searches and seizures against which the Fourth Amendment gives protection are only those which are made under legislative or judicial authority of the United States, or by an officer of the Federal Government acting officially, under claim of right, and under color of his office. There is no protection given by the Fourth Amendment to the books or papers of a citizen merely because they are his private property.

In the present case there is no pretense that Cohen acted under any legislative or judicial authority, either real or assumed. He was not an officer of the the United States in any sense. He was merely a private in the Army. His superior officers, under whose direction he went to Gouled's office, were not officers of the United States charged by law with any duty in connection with the administration of the criminal laws. He did not enter the office or obtain access to papers under any claim of right or under any pretense or color of official authority. His act, therefore, could not be said to be governmental action on the part of the United States. It follows, therefore, from the authorities cited, that in what he did there was no violation of the Fourth Amendment.

Even if Cohen had been a United States marshal, what he did would not constitute a search and seizure in violation of the Fourth Amendment.

Every search and seizure made by an officer without a search warrant is not within the condemnation of the Fourth Amendment. It may be conceded that if an entry is made into a house by the use of authority or force and a search is then made, the rights secured by the Constitution will be infringed. But it is the right and duty of the Government to secure evidence of crime, even from the accused himself, if this can be done without violating his constitutional rights. These rights are not violated if an officer goes to the accused and asks and is granted permission to enter his house or his office. Equally they are not violated if the officer, without express invitation or permission, enters a place of business which is open to the public. And again, if the personal relations existing between the officer and the accused are such that the former is in the habit of visiting the latter at his office or his home, there is nothing unlawful in his making such a visit, even though he may not disclose that he is in search of evidence. When an officer has lawfully entered a house or an office in any of these ways, the Constitution does not require him to shut his eyes to any evidence of crime that may be open to his observation. He does not do violence to any constitutional rights if he asks the accused questions the answers to which may incriminate him. The accused has the right to refuse to answer such questions, but the officer has an equal right to ask them. The officer

may rightfully ask to be shown any document believed to be in the possession of the accused.

Again, the accused may refuse to show the document, but if he does show it, it will have come to the hands of the officer without any unlawful search. If, upon thus receiving it, he finds that it contains material evidence and keeps it, it is difficult to see how it can be said that the constitutional rights of the accused have been violated. He himself has shown the paper and thus disclosed evidence which he had the right to withhold; but having shown it, if it should be left in his possession, and he should afterwards refuse to produce it, this would be sufficient basis for admitting secondary evidence, and the officer would be a competent witness to testify to its contents. The retaining by the officer of the paper after it has come to his possession, without violating the constitutional rights of the accused, then, is merely the securing of the best evidence of what could otherwise be shown by secondary evidence. In the absence of a forcible entry and a search under color of his office, there is no ground for saying that the officer has made an unconstitutional search and seizure. By retaining the paper, he may have personally been guilty of a breach of confidence, or if he retained it secretly and without the knowledge of the accused, he may, as an individual, be guilty of larceny. But he has not, under color of his office, and as a governmental act, violated the Fourth Amendment. No officer is a general agent of the

United States so that everything he does will bind the Government. His authority is limited and prescribed. Within that authority he acts for the Government, and the Government is, morally at least, responsible for what he does.

In cases in which he does without a warrant things which the law authorizes him to do under a warrant it may be with propriety said that his action is official if he assumes to act under color of his office, and thus uses the power of the Government to overcome the will of the accused. But when he makes no claim to be acting officially or with authority, uses no force or threat of force, but merely does what any other individual might do under the same circumstances, there is nothing in his conduct which is official or binding upon the Government. The seizure which is condemned by the Fourth Amendment is one which is made as the result of such a search as is condemned by the same amendment. If there is no such search, then the seizure of that which is open to his observation when rightfully in a house or office is not an unconstitutional seizure.

An interesting case on this question is *State* v. *Mausert* (88 N. J. Law, p. 286). In that case an officer arrested the proprietor of a hotel on a charge of keeping a disorderly house. The arrest was made in the hotel office and under a proper warrant. There was, however, no search warrant; but upon making the arrest the officer seized and took with him the hotel register, which tended to show the character of the house. The constitution of New

Jersey contained a provision identical with the Fourth Amendment. A seasonable application was made to the court for the return of the register. The court, however, held that the officer had rightfully entered the hotel; that the register was open to the observation of the public and was under the control of the accused; and that therefore the officer did not infringe any constitutional rights when he took it and held it as evidence.

The cases already cited emphasize the fact that the act of an officer in taking and retaining evidence found in the house of the accused is not unconstitutional when it is not preceded by an unlawful entry or search. In *Adams* v. *New York*, *supra*, officers entered a house with a proper search warrant authorizing them to seize policy slips as gambling paraphernalia. As a result they seized a large number of such slips, but also seized certain other papers, which furnished evidence for the purpose of identifying certain handwriting and to show that the slips belonged to the accused. The court stated the question involved to be—

> were the papers found in the execution of the search warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused? (Id., p. 597.)

And added:

> We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. (Id., p. 597.)

After stating that there could be no question of the right to seize under a search warrant lottery tickets and gambling devices, such as policy slips, the court said:

> But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect. (Id. p. 598.)

And speaking in the *Weeks case, supra*, of the *Adams case*, it was said that the court—

> put its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were inci-

> dentally seized in the lawful execution of a warrant and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property. (Id. p. 395.)

These decisions make it clear that if the entry and whatever search is made are made lawfully, any evidence that may be incidentally obtained while thus acting lawfully is not obtained through an unconstitutional search and seizure. In the present case, even if Cohen had been an officer, it could not be said that he entered the office of Gouled or obtained access to his papers unlawfully, for the certificate excludes all idea of force or legal compulsion as a result of which any search was made or information obtained.

The answer to Question 1 should be "no."

Because the conduct of Cohen had none of the ingredients necessary to constitute an unconstitutional search and seizure, the first question must be answered in the negative.

This follows, I think, from the facts as certified. As stated above, however, the actual facts are that Cohen went to Gouled's office when Gouled was present and had a friendly conversation with him. There were lying on top of a flat-top desk, and open to his observation, the papers in question. When Gouled temporarily left the office Cohen picked these up and put them in his pocket. If, therefore, there can be any doubt as to the proper answer to be made to this question upon the facts as certified, it is again suggested that the court, instead of making

an answer to the question, which might be misleading, should require the entire case to be certified for decision.

II.

"Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the Fifth Amendment."

This question, when applied to the facts certified, is whether the admission in evidence of a paper obtained in the manner described in Question 1 violates the Fifth Amendment, when the question is raised only by an objection made at the time the paper is offered in evidence.

It is not a valid objection to the use of papers in evidence that they have been seized as the result of an unreasonable search and their admission is not error unless the court has committed a previous error in refusing, upon application seasonably made, to order them returned.

Only one paper obtained by Cohen was introduced in evidence. Gouled did not know of its loss until it was offered on the trial. He then objected to its introduction upon the ground that it had been obtained through a violation of the rights secured to him by the Fourth Amendment and that its use in evidence would be to compel him to testify against himself, in violation of the Fifth Amendment. Even if it be assumed that there had been an unconstitutional search and seizure, the court was not in error in overruling this objection.

If there is one proposition in this case which has been settled beyond the shadow of a doubt, it is that an objection made for the first time on the trial that

evidence offered, which is otherwise competent, has been unlawfully obtained, will not avail.

In the *Boyd case, supra*, the defendant had not parted with the possession of the papers when he was put on trial. In the progress of the trial he produced them, in obedience to an order made by the court itself. Not having previously lost possession of the papers there was, of course, no occasion for him to apply for their return before the trial. His rights were not invaded until, during the trial, he was compelled by an order of the court, which was held to be equivalent to an unreasonable search and seizure, to produce them. His complaint was the same that it would have been if the court had compelled him to give oral testimony upon pain of being committed for contempt. The case, therefore, dealt only with the question as to what constitutes an unreasonable search and seizure or a compelling of the accused to testify against himself. The court did not have before it, and hence did not deal with the question, as to what were the remedies of a party aggrieved by a violation of the rights secured to him by the Fourth Amendment.

It was assumed in some quarters, however, that if evidence was secured as the result of an unreasonable search and seizure its use in evidence could be prevented by an objection made on the trial. And the opinion in the *Adams case, supra*, seems to have been written to clear up the uncertainty which the court apparently felt existed as a result of the opinion in the *Boyd case*. The *Adams case* was a prosecu-

tion in a State court and came to this court from the court of last resort of the State of New York. Mr. Justice Day, at the outset, called attention to the fact that the Fourth Amendment was a limitation upon the powers of the Federal Government and had no relation to the powers of State governments. The case could very well have been disposed of upon this proposition. The question suggested, however, was expressly pretermitted, and obviously because the court felt impelled to make it clear that the *Boyd case* did not change the well-established rule that, when evidence is offered that is otherwise competent, the court can not be required to stop and inquire into whether it has been rightfully or wrongfully obtained. The *Boyd case* had determined the rights of the accused, but had not dealt with his remedies.

In the *Adams case*, as in this case, the objection was for the first time made on the trial. The court said:

> The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained. The rule is thus laid down in Greenleaf, vol. 1, sec. 254*a*:

> "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." (Id. pp. 594–595.)

Many other authorities to the same effect were quoted and the court added:

> In this court it has been held that if a person is brought within the jurisdiction of one State from another, or from a foreign country, by the unlawful use of force, which would render the officer liable to a civil action or in a criminal proceeding because of the forcible abduction, such fact would not prevent the trial of the person thus abducted in the State wherein he had committed an offense. *Ker* v. *Illinois*, 119 U. S. 436; *Mahon* v. *Justice*, 127 U. S. 700. (Id. p. 596.)

After calling attention to the fact that the action complained of in the Boyd case was the requiring the accused at the trial to produce his papers by order of the court, that case was distinguished as follows:

> The Supreme Court of the State of New York, before which the defendant was tried, was not called upon to issue process or make any order calling for the production of the

> private papers of the accused, nor was there any question presented as to the liability of the officer for the wrongful seizure, or of the plaintiff in error's right to resist with force the unlawful conduct of the officer, but the question solely was, were the papers found in the execution of the search warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused? We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his own behalf, as was his privilege under the laws of the State of New York. He was not compelled to testify concerning the papers or make any admission about them. (Id. pp. 597, 598.)

While adhering to the rule of the *Boyd case* that the Fourth Amendment guaranteed security in person and property and against unlawful invasion of the sanctity of the home by officers of the law, acting under legislative or judicial sanction, and gave a remedy against such usurpations when attempted, the court added:

> But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent. In Boyd's case the law held unconstitutional, virtually compelled the defendant to furnish testimony against himself

> in a suit to forfeit his estate, and ran counter to both the Fourth and Fifth Amendments. (Id. p. 598.)

It was accordingly held that the question, being raised only by an objection made to the admission of evidence offered on the trial, could not be entertained by the court. This settled the proposition that the mere fact that evidence had been obtained through an unlawful search and seizure did not of itself make the admission of such evidence equivalent to compelling a defendant to testify against himself. What, if any, means were available to the accused to prevent papers so obtained from being offered in evidence against him was, of course, not determined.

Next came the *Weeks case, supra.* The *Adams case* was limited to the case of one who merely objected on the trial of the criminal case to the introduction of evidence obtained by an unlawful search and seizure. The *Weeks case,* on the other hand, dealt with the right of the accused, in a proper proceeding instituted before the trial of the criminal case, to have returned to him private papers which had been unlawfully taken. Before the time for the trial, Weeks filed a petition praying the return of the private papers which had been taken from his house by police officers and the United States marshal. This was refused. After the jury had been sworn and before any evidence had been given, he urged his petition again, but was again overruled. When the papers

were offered in evidence he objected, but his objection was overruled. In stating the case the court said:

> The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the Fourth and and Fifth Amendments to the Constitution. (Id. p. 393.)

The *Adams case* was referred to and the rule that a mere objection made on the trial is not sufficient to justify the exclusion of such evidence reaffirmed, the court saying:

> It is therefore evident that the *Adams case* affords no authority for the action of the court in this case when applied to in due season for the return of papers seized in violation of the constitutional amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes. (Id. p. 396.)

Reaching the conclusion that the papers had been illegally seized and that the judgment should therefore be reversed, the court placed its judgment squarely upon the error in refusing to return

the papers upon the making of a seasonable application, saying that—

> there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. (Id. p. 398.)

The point is that the use of such evidence on the trial is error only in the event the court has previously erroneously declined to return the papers. Such papers, having been taken from the defendant in violation of his rights under the Fourth Amendment, and the court having ratified this action by refusing to return them, it can fairly be said that they are papers which on the trial ought to have been in the possession of the defendant. In that event he could not be required to produce them. Hence when they are produced it can justly be said that they constitute evidence which has been extorted from him by physical or moral compulsion, and he has thus been compelled to testify against himself. (*Holt* v. *United States*, 218 U. S. 245, 252, 253.)

Manifestly this must be true, because the protection to private papers given by the Fourth Amendment applies only while they are in the possession of the owner. The right guaranteed to him is protection against having to part with them contrary to his own will. If they pass from his possession, either by his voluntary act or without the use, on the part

of the Government, of force or compulsion against him, any person holding them may be required to produce them in evidence without violating any of his constitutional rights. Mr. Justice Holmes, in *Johnson* v. *United States* (228 U. S. 457, 458), said:

> A party is privileged from producing the evidence but not from its production.

This was said in a case in which the defendant had been indicted for concealing money from his trustee in bankruptcy. His books, which had passed into the custody of his trustee by operation of law, were offered in evidence against him. He objected on the ground that he was protected by the Constitution against their use.

In an earlier case, *Matter of Harris* (221 U. S. 274), a bankrupt had resisted an order of the District Court requiring him to deposit his books of accounts in the office of the receiver upon the ground that they tended to incriminate him. The court said:

> But no constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the express terms of sec. 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy

> if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story. (Id. pp. 279, 280.)

In that case the order requiring the books to be deposited with the receiver contained a provision that the receiver was not to use or permit them to be used for any criminal proceeding, and the court said:

> In the properly careful provision to protect him from use of the books in aid of prosecution the bankrupt got all that he could ask. (Id. p. 280.)

In the *Johnson case, supra*, it was assumed by counsel that what was said in the *Harris case* indicated that the books could not be properly used against the bankrupt in aid of a criminal prosecution, but Mr. Justice Holmes disposed of the contention in this language:

> Courts proceed step by step. And we now have to consider whether the cautious statement in the former case marked the limit of the law in a case where no rights, if there were any, were saved when the books were transferred. The answer was implied in that decision. * * *
>
> It is true that the transfer of the books may have been against the defendant's will, but it is compelled by the law as a necessary incident to the distribution of his property, not in order to obtain criminal evidence against him. Of course a man can not protect his property from being used to pay his debts by attaching

> to it a disclosure of crime. If the documentary confession comes to a third hand *alio intuitu*, as this did, the use of it in court does not compel the defendant to be a witness against himself. (Id. pp. 458, 459.)

The same doctrine was applied in *Perlman* v. *United States* (247 U. S. 7). That case involved the right of the accused to use private papers of the defendant which the latter had previously filed as exhibits to his testimony in a civil suit. The court said (page 15):

> But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it be and in whosoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege, and to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the "physical or moral compulsion" exerted.

These cases make it clear that the fact that the documents are the private papers of an accused does not of itself preclude the use of such papers in evidence. It is only when, by force or legal compulsion, the accused himself is required to produce them that his constitutional rights are invaded. If he places

them in the custody of a third person, that person may be required to produce them in evidence, although knowledge of their existence may have come to the Government through a breach of confidence or trust on the part of the custodian. If he loses them and they are found by an officer of the law or any other person, they may be used in evidence against him. If they consist of books and papers the title to which under the bankruptcy law passes to a trustee in bankruptcy, they may be used against him. If he shows them to a friend and, on the trial, declines to produce them, that friend may be required to testify to their contents. If they are stolen from him, the thief may be required to produce them in evidence against him. Indeed, his sole privilege is not to be compelled by force or legal compulsion to himself produce them.

It is for these reasons that when private papers are taken as the result of an unreasonable search and seizure, and the accused acquiesces by making no effort to have them returned to him before the trial, his rights are not violated if another is required to produce them on the trial. In such a case what he is entitled to is to have the papers returned to him so that on the trial they will be in his possession. If he waives this right or does not avail himself of it, the papers when produced by another are competent evidence against him. This has been the rule in every case decided by this court. It has been nearly if not quite universally made the rule by State courts in dealing with similar provisions of

State constitutions. In support of this statement it is only necessary to cite the case of *Cohen* v. *State* (120 Tenn. 61), in which numerous decisions of other State courts are cited.

The plaintiff in error, of course, suggests that he could not have proceeded earlier to secure the return of the paper taken by Cohen because he did not know that it had been taken until it was offered in evidence. This can not avail him. No authority can be cited for making such an exception to the general rule which is so well established. The rule may almost be said to be one of necessity in order to secure fair trials. Orderly procedure will be impossible if the court must stop to determine whether any improper practices have been resorted to to secure any evidence that is offered. To do this is equally inconsistent with orderly procedure, whether the defendant knew or did not know that the evidence offered had been obtained. It is respectfully submitted that there is no exception to the rule and that, therefore, the plaintiff in error is not now in a position to complain, in an appellate court, of either the original taking of the paper in question or of its use in evidence on account of the manner of its taking.

It follows that Question 2 must be answered in the negative, regardless of how Question 1 may be answered.

PART TWO.

I.

"Are papers of no pecuniary value but possessing evidential value against persons presently suspected and subsequently indicted under sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected, seized and taken in violation of the Fourth Amendment?"

The certificate shows that one of the papers referred to was taken under a search warrant issued June 17, 1918, and the other two under a search warrant issued July 22, 1918. Both search warrants were issued under Title XI of the Act of June 15, 1917 (40 Stat. c. 30, p. 228). Neither the warrants nor the affidavits upon which they were issued are set out in full. No question is therefore raised as to their sufficiency with respect to properly describing the property to be seized or the place to be searched. It appears from the certificate that the search warrant of June 17 authorized a search of Gouled's office for certain contracts of Gouled and S. Lavinsky, and that the affidavit stated that these contracts were used as the means of committing a felony—a violation of section 39 of United States Criminal Code—in that Gouled did use the said contracts as means for the bribery of a certain officer of the United States. Under this warrant an unexecuted written agreement between Lavinsky and Gouled was seized, delivered to the United States district attorney, and afterwards used in evidence.

The search warrant of July 22 authorized a search of Gouled's office for "certain letters, papers, docu-

ments, and writings," the description of which in the affidavit and search warrant is omitted from the certificate, but which it was stated "relate to, concern, and have been used in the commission of a felony, to wit, a conspiracy to defraud the United States." Under this warrant there was seized (1) a written and signed contract between Gouled and one Steinthal and (2) a bill of disbursements and professional services rendered to Gouled by his attorney. The latter was subsequently introduced in evidence. The former was not offered, but a duplicate was produced by Steinthal and introduced.

The certificate states that all the papers seized under these warrants belonged to Gouled and had no pecuniary value except as so much paper stock, but constituted evidence more or less injurious to Gouled under the indictment subsequently found.

Gouled was not indicted for any offense covered by section 39 of the United States Criminal Code, but was indicted for a conspiracy to defraud the United States in violation of section 37 of the United States Criminal Code and also for a conspiracy to violate section 215 of the United States Criminal Code.

Title XI, section 2, of the Act of June 15, 1917 (40 Stat. c. 30, p. 228), enumerates the cases in which a search warrant may be issued upon proper affidavit. The second case enumerated is:

> When the property was used as the means of committing a felony; in which case it may be

> taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

The certificate states that, before the trial, a motion was made by Gouled to compel the United States district attorney to return these papers, but it was denied, and that the action of the district court in denying this motion before trial is not assigned for error in the Circuit Court of Appeals.

In the light of these facts, the question quoted above is whether a paper of no pecuniary value, but possessing evidential value, taken under a search warrant issued under the authority of the Act of June 15, 1917, and, on its face, complying fully with the requirements of that Act, is taken in violation of the Fourth Amendment.

Private papers are property whether they possess pecuniary value or not.

The Act of June 15, 1917, expressly authorizes search warrants for *property* which has been used as the means of committing a felony. Apparently, the Circuit Court of Appeals submits the question as to whether a private paper possessing in and of itself no pecuniary value is property within the meaning of this statue. That one's private papers are his property in the fullest sense of that word, regardless of whether they may possess any value to another, can scarcely be doubted. In the *Boyd* case, *supra*,

this court quoted with approval the language of Lord Camden as follows:

> Papers are the owner's goods and chattels; they are his dearest property (116 U. S. p. 627).

Unless, therefore, it can be said that no contract between parties can be used as the means of committing a crime, it must be held that these search warrants were valid and authorized the officer to make the search and seizure. Just what the nature of the contracts described in the first search warrant was does not appear from the certificate. The affidavit, however, alleged that they had been used as the means for the bribery of a certain officer of the United States. If, therefore, a contract of any kind could be used as the means of bribing an officer, there can scarcely be a question as to the validity of this search warrant. And, in the light of common knowledge as to methods pursued by crooks endeavoring to defraud the Government in the matter of war contracts, it is not at all difficult to see how such a contract could be so used. The obvious method of proceeding in such matters was for the person desiring to corrupt officials charged with the duty of letting contracts to represent to contractors that he was able to secure contracts for them and would do so for a consideration. Contracts were then made between this intermediary and the contractor by which, in the event a contract was secured, the former should receive either a fixed amount or a definite part of the profits. Armed with this contract, the

intermediary was prepared to approach the official whom he desired to corrupt. If the official was willing to be corrupted, it would be necessary to insure in some way the receipt by him of the price. A contract giving the intermediary a part of the profits, and a proposition to divide this, were the ready means of accomplishing the bribery. Plainly, therefore, there is nothing on the face of the affidavit from which it can be said that the use of the contracts mentioned as the means of accomplishing the crime was impossible. The same is true of the contract seized under the second search warrant.

This of itself would amply justify a negative answer to the question stated.

Even if the particular papers seized and subsequently used in evidence were not such that they could have been lawfully made the object of a search warrant, their seizure can not from this record be said to have been in violation of the Fourth Amendment.

Whether the papers afterwards introduced in evidence were the particular papers described in the affidavits does not appear from the certificate. The first affidavit described certain *contracts* of certain persons. No completed contract seems to have been seized. An unexecuted contract between the parties named, however, was seized. The certificate omits the specific description of the papers described in the second affidavit. Under the search warrant issued upon this affidavit an unknown number of papers were taken. Only two of these, however, were used in evidence; and it does not appear whether they were specifically described in the affidavit.

As seen above, these affidavits and search warrants justified a search for and seizure of the papers described. When the officer went to the office, however, he was serving a warrant which had a legal purpose in the attempt to find the papers described. In making the search, therefore, he was acting legally; and if, while so acting, he discovered evidence of crime and took it, he did not violate the rights of Gouled under the Fourth Amendment. This is exactly what was held in the *Adams case, supra.* This furnishes another sufficient reason for answering the question stated in the negative.

An Act of Congress which authorizes a search warrant for property which has been used in the commission of a felony is not subject to constitutional objections.

If the question stated can be construed as an inquiry into the constitutionality of the Act of June 15, 1917, it must still be answered in the negative.

The Fourth Amendment gives protection only against unreasonable searches. That searches of one's house or office may lawfully be made for various purposes can not be seriously questioned. It may be assumed that, in general, the citizen is protected against the seizure of his private papers for the purpose of using them as evidence against him. This applies, however, only to papers which are his own and to the possession of which he is entitled as against the world. If he holds them as custodian for another, that other being entitled to their possession or production, he can be compelled to produce them, and the service of a search warrant to discover

them would be no violation of his constitutional rights. He may also have so used his property as that the Government has an interest in it, or is entitled to its possession. Many of the cases in which the Fourth Amendment gives no protection against searches and seizures have been mentioned in decisions of this court. In the *Boyd case, supra,* it was said (pages 623, 624):

> The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. * * * So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a seques-

> tration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments.

And in *Adams* v. *New York*, *supra*, it was said:

> The right to issue a search warrant to discover stolen property or the means of committing crimes, is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. (Id. p. 598.)

The search warrant being valid, and the act of the officer in serving it lawful, there was no violation of Gouled's constitutional rights in taking evidence of crime found while lawf ully serving the search warrant, and for this reason the question stated must be answered in the negative.

II.

"If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant, is such admission in evidence a violation of the Fifth Amendment?"

If I am correct in the answer I have made to the preceding question, this question of course answers itself. It can not be pretended for a moment that,

if the seizure did not violate Gouled's constitutional rights, he was entitled to have the property returned to him, and its use in evidence did not compel him to testify as a witness. But if it be assumed that the seizure was in violation of the Fourth Amendment, it by no means follows that the Fifth Amendment was violated when the papers were admitted in evidence. As we have seen above, the right to have excluded from evidence in a criminal case papers previously seized, is not the remedy to which the Fourth Amendment entitles the accused to redress wrongs committed in violation of that amendment. For this reason, if prior to the trial proper steps are not taken to have the seized papers returned to the accused's possession, they are admissible in evidence against him. Moreover, when a case is reversed on account of the admission of such evidence, the reversible error is not in the admission of the papers but in the previous refusal to return them. The right of the court officials to retain and use them having been previously determined, the court, when the trial begins, properly treats that question as settled. There is, therefore, no ground upon which the papers can properly be excluded and no error in admitting them. If the accused desires to preserve his rights, his remedy is to secure a review of the action of the court in refusing to return his papers. If he does not, before the trial, invoke the judgment of the court on his right to have the papers returned, it can not now be seriously doubted that he can not complain when

they are afterwards used against him. Likewise, if he has invoked such action, and it has been adverse to him, and he does not choose to invoke the judgment of the appellate court upon that question, he must be deemed to have acquiesced in the ruling and elected to stand on his right to object to the evidence on the trial without regard to any previous action.

In this case the accused did make a seasonable application for the return of his papers. The application was overruled and the certificate contains the significant statement that the assignments of error in the Circuit Court of Appeals do not call this ruling in question. The Circuit Court of Appeals, not having before it for review, therefore, the denial of Gouled's application for the return of his papers, must assume that that ruling was correct. And if it was correct, of course, the papers were properly admitted in evidence. This is the rule which must obtain unless it can be said to be inapplicable because of one other thing that occurred. At the trial and at just what stage does not appear, except that it was before any testimony had been offered, Gouled renewed his motion previously denied and again, but on the same papers, demanded the return of all papers and documents seized under the search warrants. A judge other than the one who had denied the motion was presiding at the trial. The certificate states that he followed the ruling of his colleague and denied the motion, to which exception was taken. This can not operate to change the rule.

In the first place, the rule requires the application to be made before the trial. No decision can be found in which any distinction is made between an application of this kind made at one stage of the trial rather than at another. The decisions are to the effect that it must be made before the trial and not merely before any evidence is offered.

Moreover, when a question has once been submitted to the court and decided and is again submitted without anything new in support of the contention, the court may very properly decline to hear it again, on the ground that it had already been passed on in that case. Particularly is this true when the previous ruling has been made by a judge other than the one presiding on the trial. In such cases, the error, if any, is in the original ruling and not in the refusal to again consider the question. And, since the plaintiff in error does not now complain of the original ruling, the certificate shows that there is nothing before the court of appeals upon which error in the introduction of this evidence can be predicated.

III.

"If in the affidavit for search warrant under act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?"

This question would seem to be answered by what has already been said. It has been seen that if, during the service of a valid search warrant, documen-

tary evidence is discovered and taken, although not called for by the search warrant, its introduction in evidence does not violate any constitutional rights of the accused. The point is that no unlawful search has been made, and hence the taking of the evidence, when found, does not violate the Fourth Amendment. Much more, therefore, must it be true that, if upon examination of papers so obtained, whether named in the search warrant or incidentally taken, it appears that the accused has committed a different offense from that which it was supposed he had committed, the evidence is still admissible. The cases cited establish that the taking of these papers was not illegal or unconstitutional. That being true, the Government could undoubtedly use them for the purpose of convicting the defendant of any crime which they might tend to show he had committed.

IV.

"If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted, if he then move before trial for the return of said papers and said motion is denied, is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

Apparently what the court had in mind in submitting this question was that it could not, under the assignments of error, inquire into the original ruling denying a return of the papers. In other words, when the accused does not invoke the judgment of the appellate court as to this ruling, can the trial court be

put in error when on the trial that ruling was followed and the evidence admitted? We have seen that the method which the Constitution gives the accused of redressing a wrong committed in violation of his rights under the Fourth Amendment is not to have the evidence excluded but rather to have it returned to his possession so it can not be produced. It is settled that the production of evidence of one's private papers by another is not compelling him to testify and does not violate the Fifth Amendment. The error, if any, in this case was in the action of the court prior to the trial in denying the application for a return of the papers. Unless that ruling can be reviewed and reversed, there was manifestly no error in admitting the evidence. If there was an assignment of error seeking to review that ruling, and this court should conclude that the ruling was correct, that would be an end to the inquiry. Since Gouled has not sought a reversal of that ruling, it can not be reversed; and for this case, at least, it is established that he did not have the right to have his papers returned to him. This being true, they were properly admitted in evidence when offered by another. The answer to this question must be "No."

I have discussed, I fear, these questions at unnecessary length. I submit that the answers to the questions should be as suggested above or else that the entire case should be certified to this court for decision.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

DECEMBER, 1920.

APPENDIX.

By Mr. LITTLETON:

Q. When did you go to Mr. Gouled's office?—A. This was about January or February.

Q. That is, 1918?—A. Yes, sir.

Q. You were then in the Military Intelligence?—A. Practically as a volunteer operator.

Q. I did not hear you.—A. Practically, I was a volunteer operator.

Q. But you were acting for the Government?—A. Yes, sir.

Q. And under the directions of the Government?—A. Yes, sir.

Q. And under the direction of the United States Government officers?—A. Yes, sir.

Q. And you went there under their direction?—A. Yes, sir.

Q. Did you have any warrants?—A. No. sir.

Q. What?—A. No, sir.

Q. Did you go to his office alone?—A. Yes, sir.

Q. Did you see anybody in his office?—A. Yes, sir.

Q. Who did you see?—A. Mr. Gouled.

Q. Did you talk with him?—A. Yes, sir.

Q. You say you took the papers from his office?—A. Yes, sir.

Q. Did he give them to you?—A. No, sir.

Q. Did he see you take them?—A. No, sir.

Q. Did you take them while he was not looking?—A. Yes, sir.

Q. From what place in the office did you take them?—A. From the desk.

Q. From his desk?—A. Yes, sir.

Q. From the drawer of the desk?—A. No, sir.

Q. From the top of the desk?—A. Yes, sir.

Q. Was it a flat-top desk?—A. Yes, sir.

Q. Where was he when you took them?—A. He stepped out for a minute, I think.

Q. Did you say anything to him about taking them?—A. No, sir.

Q. Either before or after you took them?—A. No, sir.

Q. Were you acting under the direction of your superior at the time you took them?—A. Yes, sir.

Q. And you returned them to your superior?—A. Yes, sir.

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